

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of

Acceleration of Broadband Deployment  
Expanding the Reach and Reducing the Cost  
of Broadband Deployment by Improving  
Policies Regarding Public Rights of Way and  
Wireless Facilities Siting

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WC Docket No. 11-59

**REPLY COMMENTS OF NEW AMERICA FOUNDATION'S OPEN TECHNOLOGY  
INITIATIVE, MEDIA ACCESS PROJECT, PUBLIC KNOWLEDGE, AND ACCESS  
HUMBOLDT**

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New America Foundation’s Open Technology Initiative (“OTI”), Media Access Project (“MAP”), Public Knowledge (“PK”), and Access Humboldt (together, “Commenters”) respectfully submits these comments in response to the Federal Communications Commission’s *Notice of Inquiry* (“NOI”) in the above-captioned docket. The NOI seeks comment on “whether there is a need for coordinated national action to improve rights of way and wireless facilities siting policies”<sup>1</sup> and “what role the Commission should play in conjunction with other stakeholders.”<sup>2</sup>

**SUMMARY**

In response to the Commission’s NOI and in consideration of initial comments filed, Commenters urge the Commission to refrain from imposing any sweeping, standardized federal

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<sup>1</sup> Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting, WC Docket No. 11-59, *Notice of Inquiry*, 26 FCC Rcd 5384 at ¶ 9 (Rel. April 7, 2011) (“NOI”).

<sup>2</sup> *Id.*

regulations on states and municipalities that would undermine the ability of local governments to determine the appropriate right-of-way practices to promote community interests and well-being.

Right-of-way practices are designed to address a myriad of local interests – including but not limited to ensuring sustainable use of property in the public trust and protecting public safety and general welfare. The most appropriate practices for addressing those interests will vary by locality; thus a “one-size-fits-all” regulatory framework administered by the Commission would be wholly inadequate and ill-equipped to adapt as local interests and needs evolve.

Moreover, right-of-way practices are in no way more of a deterrent to the deployment of infrastructure than the kinds of obstacles that every real estate developer must navigate. Whatever tangential benefit their removal could achieve would be dwarfed by the costs to localities of a “one-size-fits-all” framework that will not only fail to serve local interests but will also be a significant waste of resources spent duplicating existing institutional knowledge and experience at the local level with unnecessary federal oversight. Indeed, any convenience achieved by summarily dismissing local permitting and zoning regulations could not outweigh the local interests those regulations protect.

In any event, the record is devoid of any evidence of the type of systemic problem that could justify or necessitate the intervention of Federal authorities to strip local governments of their ability to manage their public rights-of-way in the interests of the communities they were elected to serve. Neither the record nor the Commission itself has demonstrated with any rigorous empirical analysis that right-of-way practices significantly impact broadband deployment. Initial commenters writing in favor of federal regulation largely fail to demonstrate that local right-of-way practices on a systemic basis have historically discouraged deployment or would discourage future deployment. Rather, the empirical analysis presented by the National

League of Cities, the National Association of Counties, the United States Conference of Mayors, *et al* (“National Associations”) supports the converse conclusion – that local right-of-way practices have not created unreasonable barriers to broadband deployment or adoption.

Thus, rather than treating local governments as a barrier to be overcome, both the Commission and the many broadband providers who consistently have lobbied to marginalize local government’s role should view them as a vital lynchpin in achieving the Commission’s broadband deployment and adoption goals as provided in the National Broadband Plan. Thus, we agree with the National Associations’ assertion that the Commission’s more appropriate and useful role in this matter should be one of a facilitator – activating the Intergovernmental Advisory Committee (“IAC”) it previously authorized, and bringing *all* stakeholders to the table to identify areas of potential cooperation on this matter.

## **I. INTRODUCTION**

The tone and substance of the NOI suggests that the Commission is considering a significant expansion of its involvement in managing right-of-way practices. These practices have historically and consistently been identified as local issues, serving local interests and purposes and responding appropriately to local political pressure. States and municipalities have strong incentives in encouraging broadband deployment to businesses and residents within their communities and therefore have little interest in maintaining overly restrictive right-of-way practices. On the other hand, broadband providers do not have incentives to ensure that their practices do not harm local interests. Indeed, the entities best suited to balance the protection of local interests with the need for timely broadband deployment are local governments and not the Commission. Moreover, local governments have experience and institutional knowledge in this area, qualifications that the Commission cannot replicate and need not duplicate as a matter of efficiency.

Commenters therefore urge the Commission to refrain from imposing standardized right-of-way regulations that would preempt local right-of-way oversight and management. Instead, Commenters ask the Commission to encourage broad cooperation among stakeholders, facilitating timely broadband deployment in a way that preserves local governments' role and authority in managing right-of-way practices.

## **II. LOCAL RIGHT-OF-WAY MANAGEMENT AND PRACTICES SERVE A NUMBER OF CRITICAL PURPOSES AND LOCAL INTERESTS.**

Right-of-way practices serve a number of critical purposes, including the sustainable management of public property and general police power to protect the public's health, safety, and general welfare. As a result of the breadth of interests served, right-of-way practices and

related regulations are inherently varied and unique to each community. Any federal oversight, preemption, or standardization of these local practices risks over-generalizing their complexities and disserving the interests they address. Local governments, as opposed to federal agencies, are uniquely suited to balancing the needs and interests of communities, promoting efficient and responsible development of infrastructure, while maintaining appropriate oversight from local constituencies.

Acting as a steward of taxpayer-owned property, a local government has an interest in the recovery of fair value for the property's occupation and use through franchising, licensing and leasing.<sup>3</sup> It also has an interest in ensuring that such property is managed in a sustainable fashion and not damaged.<sup>4</sup> Local governments also have a compelling interest in protecting the safety and wellbeing of their constituents.<sup>5</sup> The risk of harm to communities in these latter two contexts is particularly significant, as evidenced by the serious damage caused to taxpayer-owned infrastructure as a result of Verizon's attempted FiOS deployment -- damage that included broken water, sewer, phone, gas, cable, and electric lines, with resulting outages and fires.<sup>6</sup> In these occurrences, it is the local government, not the broadband providers, that is held to account by local constituents for such failures.

Thus, as the National Associations noted, "[f]or all of these practices, local governments have an interest in ensuring that persons and property are protected from harm, that

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<sup>3</sup> Comments of the National League of Cities, the National Association of Counties, the United Conference of Mayors, the International Municipal Lawyers Association, the National Association of Telecommunications Officers and Advisors, the Government Finance Officers and Advisors, the Government Finance Officers Association, the American Public Works Association, and the International City/County Management Association, WC Docket No. 11-59 at 17 (filed July 18, 2011) ("National Associations Comments").

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 18-19.

<sup>6</sup> *Id.* at 19-20.

environmental and other interests are respected, and that there is minimum disruption to other, critical activities.”<sup>7</sup> Indeed, just as “[p]roviding broadband service requires the deployment and use of varied and physically dispersed communications infrastructure, including cables, antennas, poles, towers, and a variety of electronic equipment,”<sup>8</sup> harmonizing those varied components of broadband provisioning with the myriad of interests that right-of-way practices protect requires careful, flexible, locality-driven regulations and procedures.

### **III. CLAIMS THAT LOCAL RIGHT-OF-WAY PRACTICES SYSTEMATICALLY DISCOURAGE BROADBAND BUILD-OUT ARE NOT SUPPORTED.**

The Commission seeks comment on whether “there is a need for coordinated national action to improve rights of way and wireless facilities siting policies, and if so, what role the Commission should play in conjunction with other stakeholders.”<sup>9</sup> To this end, the Commission asks specifically for “systemic practices rather than individual or anecdotal situations, which are less suited for federal policies.”<sup>10</sup> Given the variety of disparate local interests highlighted in the previous section, painting a full account of the breadth of issues arising in localities across the country necessarily involves “individual, anecdotal situations” *in addition to* “systemic policies.” However, it is telling that the only empirical and statistically-grounded analysis of the systemic impact of local right-of-way practices presented in the initial comment period came from the National Associations and Montgomery County, Maryland, and that both analyses concluded,

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<sup>7</sup> *Id.* at 17.

<sup>8</sup> NOI ¶ 3.

<sup>9</sup> NOI ¶ 9.

<sup>10</sup> *Id.*



contrary to the unsupported assertions of several industry commenters, that local right-of-way practices have not deterred broadband deployment or adoption on any significant scale.<sup>11</sup>

As the National Associations point out, “[r]ight-of-way practices are generally not a significant factor in a broadband provider’s deployment calculus, [...] add little to overall construction costs, and can reduce costs to the extent that these practices ease coordination or prevent property damage.”<sup>12</sup> Their analysis juxtaposes two demographically and geographically comparable states, revealing that while the state of Oregon employs right-of-way practices that permit charges beyond costs, including municipal requirements that providers pay a 5% franchising fee, it *surpasses* Colorado in terms of broadband deployment, a state that imposes right-of-way practices that could safely be characterized as provider-friendly<sup>13</sup> and limits permissible right-of-way charges to costs associated with the permitting process.<sup>14</sup> Data from other states supports and furthers the conclusion that local fees have had no effect on broadband deployment;<sup>15</sup> and Montgomery County’s statistical data leads to a similar conclusion: that

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<sup>11</sup> National Associations Comments at 7; Comments of Montgomery County, WC Docket No. 11-59 at 16 (filed Jul. 18, 2011) (“Montgomery County Comments”).

<sup>12</sup> National Associations Comments at 8, *citing* Columbia Telecommunications Corporation, *An Engineering Analysis of Public Rights-of-Way Processes in the Context of Network Design and Construction* (July 13, 2011); ECONorthwest, *Effect on Broadband Deployment of Local Government Right of Way Fees and Practices* (June 18, 2011) (“ECONorthwest Report”). Moreover, the National Associations refute the National Broadband Plan’s assertions regarding the costs associated with permitting, pole attachment leasing arrangements, and rights-of-way by pointing out that the NBP 20% of deployment costs figure grossly overstates reality, National Associations Comments at 8.

<sup>13</sup> National Associations Comments at 8. “Colorado prohibits local governments from charging telephone companies rent for use of rights-of-way, and it limits police power fees to recovering those [that are] essentially related to the cost of processing a permit.”

<sup>14</sup> *Id.*

<sup>15</sup> *See Id.* at 12, which includes data about states such as Rhode Island, Alaska, Kansas, Nebraska, California, Minnesota, Iowa, and Missouri, and which further supports the aforementioned conclusion. Similarly, comments submitted on behalf of various municipalities

“local governments are not a barrier to broadband deployment; action and inaction by private industry is the relevant determinant of broadband deployments.”<sup>16</sup>

Industry commenters also have failed to demonstrate that other means cannot address some of the right-of-way issues, ignoring the business realities of a changing technological landscape. For example, as the industry moves away from cell siting exclusively through large towers, and toward a heterogeneous deployment that includes smaller microcells<sup>17</sup>, providers can address a significant portion of their siting concerns by contracting privately with community residents and businesses to supplement existing tower sites.

Further, it is broadly in the economic interests of local governments to ensure their communities have access to affordable broadband. Broadband infrastructure encourages investment in local communities, increases efficiencies for local businesses, and streamlines government processes while reducing waste. Local governments recognize and have a strong incentive to appropriately weigh these benefits in the analysis and development of right-of-way practices.<sup>18</sup> This is made plain by the many local governments that have taken extraordinary

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further this conclusion anecdotally. *See, e.g.* Comments of the City of Dublin, Ohio, WC Docket No. 11-59 at 2 (filed Jul. 18, 2011) (“Dublin Comments”).

<sup>16</sup> Montgomery County Comments at 2.

<sup>17</sup> *See* Peter Svensson, “Wireless advances could mean no more cell towers,” USAToday available at [http://www.usatoday.com/tech/wireless/2011-02-11-wireless-everywhere\\_N.htm](http://www.usatoday.com/tech/wireless/2011-02-11-wireless-everywhere_N.htm). Noting that “the wireless industry is planning a future without [large cell towers]” and “looking at much smaller antennas, some tiny enough to hold in a hand.”

<sup>18</sup> *See, e.g.* National Associations Comments at 15. “Local Governments compete vigorously with one another to attract and encourage deployment of advanced and reliable utilities that will in turn attract and support new industrial, commercial, and residential development. This is a strong incentive not to overprice right-of-way access”; and at 35: “This should not be surprising: every community has a significant interest in promoting development and infrastructure, and thus an interest in revising and streamlining procedures so that the permitting process is as effective as possible...”; Dublin Comments at 2: “...broadband service is available to all households and business in our jurisdiction. There is no evidence that our policies or charges

measures to bring high-speed broadband infrastructure to their local communities and promote economic growth and opportunity<sup>19</sup> when the private sector financial interests have been insufficient for reasons of profits – not for reasons of right-of-way practices.<sup>20</sup> No one can credibly claim that cumbersome right-of-way policies are the reason that communities across rural America continue to lack access to affordable high-speed broadband connections. As the Commission itself noted, “Broadband providers’ investment in rural areas has been substantial to date”<sup>21</sup>, and problems relating to deployment are a result of “cost, distance, density, demographics, and topography.”<sup>22</sup>

Broadband providers, most of which are owned and operate on a national scale and whose overwhelming concern is maximizing value for their shareholders, do not have the same incentives or stake in promoting local community interests and development as local governments. Put another way, local governments have little interest in implementing or maintaining needlessly cumbersome right-of-way practices that will significantly undermine local economic growth, while broadband providers have every incentive to ignore, quash, or otherwise subvert local regulations in order to raise profits and streamline corporate efficiencies

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with respect to placement of facilities in the rights-of-way ... have discouraged broadband deployment.”

<sup>19</sup> See Comments of New America Foundation, Consumers Union, and Media Access Project, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, GN Docket No. 09-51, CC Docket Nos. 01-92, 96-45 at 5 (filed April 18, 2011).

<sup>20</sup> See Gregory Rose, “Wireless Broadband and the Redlining of Rural America,” New America Foundation (April 2010), *available at* [http://wirelessfuture.newamerica.net/publications/policy/wireless\\_broadband\\_and\\_the\\_redlining\\_of\\_rural\\_america](http://wirelessfuture.newamerica.net/publications/policy/wireless_broadband_and_the_redlining_of_rural_america).

<sup>21</sup> Update to 2009 Rural Broadband Report ¶ 13.

<sup>22</sup> *Id.* at ¶ 29.

without externalizing any of the local interests that right-of-way practices are designed to protect and promote.

#### **IV. FEDERAL PREEMPTION OF LOCAL RIGHT-OF-WAY PRACTICES IS AN INAPPROPRIATE RESPONSE TO A COMPLEX REGULATORY FRAMEWORK.**

We recognize that the fact that right-of-way practices do not significantly impact broadband deployment does not mean that they do not impose some costs and burdens on providers. However, the entities in the best position to balance such burdens with the benefits of timely deployment while also ensuring the safety and protection of interests of local communities are states and municipalities. Local governments are best aware of the specific needs of the communities they serve, have an equal if not greater interest in encouraging deployment of communications infrastructure than providers, and are politically accountable to local constituents, who stand to lose their political voice should their power be displaced by federal-level proceedings. Substantively, local governments provide an unmatched, comprehensive level of expertise in dealing with the issues underlying local right-of-way practices. These right-of-way practices “have developed after considerable study and analysis, and local governments now employ many leading thinkers and managers in the field;”<sup>23</sup> and the institutional knowledge that each local government has accumulated cannot (and should not, as a matter of efficiency) be replicated by the Commission.

In addition, maintaining right-of-way processes at the local level encourages regulatory responsiveness and flexibility. Not only is the Commission ill-equipped to aggregate the needs of every local community across the country and synthesize those needs into a federal-level regulations, it is also not equipped to routinely and frequently revisit those standards as local

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<sup>23</sup> National Associations Comments at 43.

needs – needs regarding zoning, permitting, leasing, and buildout of other necessary infrastructure – continue to change. Local governments instead are, by their very nature, those best suited to responding to those changing needs, and doing so in a timely, efficient matter.

Finally, local governments are politically accountable to their constituents in a way that a federal agency cannot match. In communities unhappy with the pace or shape of development, lack of access to broadband infrastructure, or any number of related issues, constituents can participate in local rules proceedings or, if necessary, vote their elected officials out of office. Broadband providers have access to the same local and state processes as local constituents and in some instances, equally can leverage their economic power to influence the local processes. Indeed, even in communities where they have little to no financial interest in providing service, providers already have exerted their influence successfully to advance their business interests, including through efforts to marginalize local governments' ability to oversee broadband deployment or self-provision.<sup>24</sup>

The Commission, on the other hand, is extremely attenuated from local communities and has little to no political accountability to them. Even municipal representatives would have difficulty ensuring that their voices were heard, particularly against the voices of every other municipal representative seeking to shift new federal regulations to better suit suddenly unmet local interests. While industry interests in right-of-way practices are mostly consistent (and the impact of their influence therefore increased), local interests are varied and the localities themselves geographically dispersed. This variety compounds the difficulty before local representatives seeking to aggregate and represent local needs, then influence decision-making

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<sup>24</sup> See, e.g., Matthew Lasar, "Cable-backed anti-muni broadband bill advances in North Carolina," *Ars Technica* (Mar. 30, 2011) *available at* <http://arstechnica.com/tech-policy/news/2011/03/cable-backed-anti-muni-broadband-bill-advances-in-north-carolina.ars>.

on a federal level. Moreover, some of the industry-driven proposals, including those requiring municipalities to justify costs of access, would place a considerable financial burden on local governments at a time when all levels of government are facing significant budget shortfalls, even as those same industry interests continually block efforts by local and state governments to increase revenues to support such government functions.<sup>25</sup>

Ultimately then, the proper role for the Commission is facilitating dialogue, rather than implementing far-reaching rules that are unresponsive to local needs. The willingness of some industry commenters in this proceeding to blithely assert the Commission's broad jurisdiction in these matters, "even absent a specific mandate for a rulemaking"<sup>26</sup> is particularly specious given their past antagonism and opposition to that very idea in other proceedings.<sup>27</sup> Commenters agree with the National Associations that the Commission's first step should be activating the Intergovernmental Advisory Committee ("IAC") to facilitate discussion among various stakeholders while highlighting local right-of-way practices that have been evidenced to promote broadband deployment. Rather than viewing local governments as an obstacle to universal,

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<sup>25</sup> For example, the industry has fought against local sales taxes on wireless and broadband services. *See, e.g.* "What is your State's Monthly Wireless Tax Burden on Consumers? New Report Highlights Need for Communications Tax Reform, CTIA Blog (Feb. 15, 2011).

<sup>26</sup> Comments of CTIA, WC Docket No. 11-59 at 25-26 (filed Jul. 18, 2011).

<sup>27</sup> Compare to a previous statement from CTIA on Commission authority in the Broadband Reclassification proceedings: "The *Open Internet NPRM* expressly relies on the FCC order that was vacated in *Comcast*, and does not attempt to draw a connection to any express delegations of regulatory authority as a basis for the exercise of ancillary authority other than sections 706 and 230(b). Both of those statutory provisions were addressed in *Comcast*, and the Court of Appeals held they were insufficient to support the exercise of ancillary authority without a link to a specifically delegated power." Comments of CTIA, GN Docket No. 10-127 at 87 (filed July 15, 2010).

affordable broadband, the Commission's broader goal should be fostering a spirit of cooperation between broadband providers and local governments.<sup>28</sup>

## **V. CONCLUSION**

For the reasons outlined above, Commenters urge the Commission to refrain from imposing standardized right-of-way regulations that would preempt local right-of-way oversight and management. Right-of-way practices address and protect local interests, do not systemically deter broadband deployment, and are best developed and administered at the local, rather than federal, level. Ultimately, the most appropriate role for the Commission is to encourage cooperation among federal efforts, providers and local communities and to facilitate universal broadband deployment in a way that does not impede local governments' mandates to promote and protect the needs and interests of the communities they represent.

Respectfully submitted,

/s/

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<sup>28</sup> National Associations Comments at 49-50.